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No. 452

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1960

CONNER AIR LINES, INC. AND F. A. CONNER, *Petitioners*

v.

AVIATION CREDIT CORPORATION, L. B. SMITH AIRCRAFT CORPORATION, and L. B. SMITH, *Respondents*

## RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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### ADDITIONAL STATEMENT OF THE CASE

The facts of the case are as substantially set forth in the Opinion of the Court of Appeals (Petition, App. 1-14).

Briefly, the transaction between the parties involved a financing agreement wherein Respondent, Aviation Credit Corporation (hereinafter referred to as "Aviation Credit") agreed to advance certain specified moneys in the future to Petitioner, Conner Air Lines,

Inc. (hereinafter referred to as "Conner"), to pay for certain conversion and rehabilitation work on a DC-6 aircraft owned by Conner and to also pay certain obligations already incurred or which were contemplated to be incurred by Conner, the conversion and rehabilitation work on the aircraft having been contracted for by Conner with Respondent, L. B. Smith Aircraft Corporation (hereinafter referred to as "Smith Aircraft"), a corporation affiliated with Aviation Credit Corporation through common directors, officers and stockholders, and said advances were to be secured by a lien in favor of Aviation Credit on the DC-6 aircraft by way of a conditional sales contract, treated by the Trial Court as a mortgage (Plaintiff's Exh. 1, R. 62-70). This initial financing agreement specifically provided in paragraph 9a thereof that Conner would be credited with any sums which were not advanced by Aviation Credit or expended by Aviation Credit on behalf of Conner (Plaintiff's Exh. 1, R. 69). This specific provision was included because it was impossible to know in advance exactly the amount of money which would be advanced and when, and this evidences the specific intention of the parties to adjust the principal sums and interest accordingly. The Trial Court found that in accordance with this provision Conner was advised by Aviation Credit at the time of default that due credit would be given and adjustments made on the various notes and mortgage for unearned interest and principal sums not advanced (Finding No. 14, R. 111). Simultaneously with the execution of the financing agreement, Conner executed and delivered to Aviation Credit its note (R. 17) calling for payment of principal and interest covering the moneys agreed to be advanced by Aviation Credit, including $150,000 to pay

Smith Aircraft for work on the aircraft as contracted for by Conner. The payments under the note were to be made over a period of thirty-two months, and interest was included in said installments at the rate of 11.58% per annum computed on reducing balances (a legal rate for corporations in Florida), and calculated as close as possible to the dates when moneys would be advanced by Aviation Credit. Prior to the date when the first installment on the aforesaid note was due, an arrangement was worked out whereby Smith Aircraft agreed with Conner to do additional work on the aircraft and Conner agreed to increase the price for the interior work on the aircraft covered by the original contract with Smith Aircraft because of the unexpected delays and increased labor hours on this interior work. Aviation Credit agreed to finance the revised deal between Conner and Smith Aircraft, and an appropriate supplemental finance agreement was executed to cover the additional work, increased price, and extension of four (4) installments (Plaintiff's Exh. 16, R. 85), and a supplemental note (Exh. H, R. 88) was given and again interest at the rate of 11.58% per annum on a reducing balance was included. Conner also subsequently executed and delivered to Aviation Credit a third supplemental note (R. 74) to cover additional moneys advanced by Aviation Credit and again interest at the rate of 11.58% on a reducing balance was included. All notes were secured by the lien of the conditional sales contract on the aircraft, treated by the Trial Court as a mortgage. All notes were likewise subject to the adjustment provision of the original finance agreement.

Aviation Credit actually advanced to Conner or for its benefit the total principal sum of $492,393.68, of

which amount $223,733.55 was actually paid to Smith Aircraft as Conner's agreed price for the work performed by Smith Aircraft on the aircraft. Aviation Credit also advanced an additional $9,703.99 to protect its interest under its lien on the aircraft.

Aviation Credit, in a suit under the provisions of Title 28 U.S.C. Section 2410, to originally quiet title of said aircraft by virtue of the conditional sales contract but amended at trial to a foreclosure suit by reason of the Trial Court's treatment of the conditional sales contract as a chattel mortgage, sought to recover only the moneys actually advanced by it to or on behalf of Conner, to-wit, the sum of $492,393.68 with interest at the rate of 11.58% per annum from the actual date each portion of said total sum was advanced, plus the sum of $9,703.99 advanced to third parties to protect its lien, with interest at the legal rate of 6% per annum from the date of actual advancement. *The claim of Aviation Credit, therefore, was not based on the face amount of the notes, but based upon the notes as adjusted under the terms of the finance agreement. Conner has never paid any portion of the moneys advanced nor any interest thereon.*

Included in the $223,733.55 paid by Aviation Credit to Smith Aircraft on behalf of Conner for work performed on the aircraft, was the sum of $73,733.55 to cover the additional work on the aircraft and the increased price of the interior work as agreed upon between Conner and Smith Aircraft, which additional amount Aviation Credit agreed to finance in accordance with the supplemental agreement. Of the aforesaid amount of $73,733.55, the amount of $33,310.18 was for the agreed increased price on the interior work on the aircraft.

There was no finding by the Trial Court that the original financing agreement, involving the original note, was in any respect usurious and the clear implication of the findings is that it was not. However, with respect to the supplemental transaction involving the additional work on the aircraft and the increased price of the interior, totaling $73,733.55, the Trial Court found that the increased price for the interior work in the sum of $33,310.18 was a charge over and above the reasonable charges for profits and the value of materials and services furnished by Smith Aircraft for work on the aircraft. The Trial Court then termed this overcharge as a bonus for the loan or advance of money (Finding No. 16, R. 112), and then by some legerdemain visited this bonus upon the lender, Aviation Credit, and held that this sum of $33,310.18 when added to the interest of 11.58% per annum claimed by Aviation Credit constituted a civilly usurious charge in excess of 15% per annum, contrary to the Florida statutes (Section 687.03, Florida Statutes 1955). The Trial Court then, upon the basis of such finding, decreed that Aviation Credit was entitled to recover the balance of $459,083.50 ($492,393.68 less $33,310.18 equals $459,083.50) without interest (Finding No. 17(2), R. 112). In the final decree, however, the Trial Court, applying the second penalty provision of the Florida Usury Statute (Section 687.04, Florida Statutes 1955), doubled the alleged bonus for financing of $33,310.18 and deducted this doubled amount of $66,620.36 from the balance of $459,083.50 and decided that under its financing agreement Aviation Credit should recover only $392,463.14 without interest (R. 136). Thus the Trial Court trebled the alleged bonus of $33,310.18.

Both Petitioners and Respondent Aviation Credit appealed the Trial Court's decision to the Court of Appeals.

The Respondent, Aviation Credit, claimed that the Trial Court was in error in finding a bonus of $33,310.18 representing unreasonable profits of the repairman, Smith Aircraft, principally when there was no evidence in the record by which the Trial Court could measure the difference between a fair profit and an unreasonable profit, and then visit this unreasonable profit as a bonus for financing upon the lender, Aviation Credit, to constitute a usurious transaction, so as to disallow recovery of this amount as well as to disallow all claimed interest under the first penalty provision of the Florida Usury Statute (Section 687.04, Florida Statutes, 1955). Aviation Credit further complained of the Trial Court's doubling the alleged bonus in application of the second penalty provision of the Florida Usury Statute (Section 687.04, Florida Statutes, 1955).

The Petitioners limited their appeal to the Court of Appeals to a single question of law; that is whether under the facts as found by the Trial Court, Aviation Credit had taken or reserved or had been paid interest included in the promissory notes within the meaning of the Florida Usury Statute (Section 687.04, Florida Statutes, 1955) so as to inflict the second of the two alternative penalties provided therein (R. 149).

The Court of Appeals, applying the Florida law to the facts before it, agreed with Respondent, Aviation Credit, that the bonus of $33,310.18 had not been "taken or reserved or been paid" within the meaning of the second penalty provision of the Florida Usury Statute

Section 687.04, Florida Statutes, 1955), and that, therefore, the Trial Court was in error in reducing the recovery of Aviation Credit by doubling the bonus, and accordingly restored to Aviation Credit's recovery, the principal amount of $66,620.36, affirming, however, the Trial Court's single deduction of $33,310.18 as usurious interest under the first penalty provision of the Florida Usury Statute (Section 687.04, Florida Statutes, 1955).[1] The Court of Appeals, further applying the Florida law to the facts before it, held Petitioners' appeal to be without merit on the basis that the interest included in the promissory notes or as claimed by Aviation Credit had not been taken or reserved or paid within the meaning of the second penalty provision of the Florida Usury Statute (Section 687.04, Florida Statute, 1955) and that, therefore, Aviation Credit's recovery should not be further reduced by double this claimed interest (Petition, App. 1-14).

The Petitioners seek to review the Court of Appeals' decision to restore the doubled bonus amount of $66,620.36 to Aviation Credit's recovery as well as the refusal to further reduce Aviation Credit's recovery by twice the amount of the interest included in the notes by applying the second penalty provision of the Florida Usury Statutes (Section 687.04, Florida Statutes, 1955).

The question presented for review by Petitioners, as well as Petitioners' statement of the case, ignores com-

[1] This was despite the fact that the Trial Court had no competent evidence before it to hold that the $33,310.18 additional agreed price for the initial work on the aircraft represented unreasonable profits to the repairman, Smith Aircraft, without which finding there could not have been a finding of usury in this case.

pletely the undisputed facts, as found by the Trial Court and affirmed by the Appellate Court, that the notes were to cover future advances, with provision for adjustment under a basic financing agreement, and were not intended to be payable absolutely according to their face amounts, and the further fact that Aviation Credit's suit was not on the face amount of the notes but was solely for the moneys actually advanced with interest at a legal rate of 11.58%, from the dates of actual advancement of such monies.

## ACTUAL QUESTION PRESENTED FOR REVIEW

In view of the additional statement of the case as aforesaid, Respondents respectfully submit that the question presented for review is not as set forth by Petitioners (Petition, p. 2) but is actually as follows:

> Where a borrower and a lender in a Florida transaction (1) enter into a financing contract whereby money is to be advanced over a period of several months, (2) estimate the prospective dates of the contemplated advancements and calculate interest to maturity at a legal rate, (3) include in negotiable notes and mortgages given to secure such future advances, the total amount of such estimated principal and interest, (4) agree that the borrower shall be given credit for amounts not advanced as contemplated and unearned interest, (5) execute and deliver all instruments simultaneously as one transaction, (6) make and accept actual advancements of $492,393.68 in strict compliance with the agreements, and (7) upon default, the borrower having paid nothing on principal or interest, the lender forecloses upon the security seeking recovery only of the actual sums advanced

with interest only from the dates of each such advancement, does the fact, that the Trial Court found that $33,310.18 of the $492,393.68 actually paid out by the lender for the borrower was a "bonus" which when added to the interest claimed constituted civil usury, require, under the Florida Usury Statute, the forfeiture of the interest and the bonus as determined by the Court of Appeals, or additionally, the forfeiture of double the bonus and the interest.

## REASONS WHY WRIT SHOULD NOT BE GRANTED

Respondents respectfully submit that the Writ should not be granted for the following reasons:

1. The United States Supreme Court ordinarily accepts the determinations of the Courts of Appeals on question of local law.

2. The decision of the Court of Appeals is not in conflict with the Florida law as asserted by Petitioners, but on the contrary follows the law implicitly.

## ARGUMENT

### I.

### The United States Supreme Court Ordinarily Accepts the Determinations of the Courts of Appeals on Questions of Local Law

The Court of Appeals, in its decision, interpreted the Florida Usury Statute, Section 687.04, Florida Statutes, 1955, of which interpretation Petitioners seek the review of this Court.

This Court has consistently held that it will ordinarily accept the determinations of the Courts of Appeals on questions of local law.

In the case of *General Box Company* v. *United States*, 351 U.S. 159, 76 S. Ct. 728, 100 L. Ed. 1055 (1956), involving an action to recover damages for the value of timber on the Mississippi River destroyed by a government contractor, an interpretation of the Louisiana law with respect to the notice required of the State in connection with exercising its rights under a riparian servitude was before the Court. The Court of Appeals had held, based upon its analysis of the Louisiana law, that prior notice to the petitioner was not a prerequisite to an appropriation of its timber for levee purposes. This Court said, at page 165:

> "We ordinarily accept the determinations of the Courts of Appeals on questions of local law, and we do so here. Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530, 534, 69 S. Ct. 1233, 1235, 93 L. Ed. 1520; Huddleston v. Dwyer, 322 U.S. 232, 237, 64 S. Ct. 1015, 1018, 88 L. Ed. 1246."

And in the case of *County of Allegheny* v. *Frank Mashuda Company*, 360 U.S. 185, 79 S. Ct. 1060, 3 L. Ed. 2d. 1163 (1959), involving an action for easter challenging the validity of the taking of plaintiff's property, an interpretation of the Pennsylvania law with respect to condemnation rights was before the Court. The Court of Appeals had interpreted the Pennsylvania law and the petitioner was challenging the same. This Court said, at pages 190-191:

> "It is perfectly clear under Pennsylvania law that the respondents could have challenged the validity of the taking, on the ground that it was not for public purposes, in a suit brought in a Court of Common Pleas independent of the damage proceedings pending on appeal from the Board of Viewers. The Court of Appeals' opinion instructs us as to the state procedure which would have applied if

respondents had chosen the state forum: 'These [Pennsylvania] authorities establish the propriety, if not the necessity, of testing the validity of a condemnation in a proceeding in the Pennsylvania courts independent of that in which compensation is awarded. * * *

"We, of course, usually accept state law as found by the Court of Appeals, see Propper v. Clark, 337 U.S. 472, 69 S. Ct. 1333, 93 L. Ed. 1480; The Tungus v. Skovgaard, 358 U.S. 588, 596, 79 S. Ct. 503, 508, 3 L. Ed. 2d. 524, and we have no hesitancy in doing so here where there is no indication that its conclusion as to the state law is not correct."

As demonstrated in the succeeding portion of this Brief, it is respectfully submitted that the Court of Appeals correctly interpreted and applied the Florida Usury law to the facts of this case, in which circumstance, this Court should not therefore disturb the same.

## II.

### The Decision of the Court of Appeals Is Not in Conflict With the Florida Law as Asserted by Petitioners, But on the Contrary Follows the State Law Implicitly

The opinion of the Court of Appeals (Petition, App. A) is in full accord with the Florida Usury Statute and State decisions construing same. Petitioners and Respondents relied upon the identical Florida decisions in the Court of Appeals, and differed only as to their application to the admitted facts in this case.

Section 687.04, Florida Statutes, 1955, provides the penalty for violating the civil usury statute (See 687.03). It provides two distinctly separate penalties.

The first is that the lender "shall forfeit the entire interest so charged, or contracted to be charged or

reserved, and only the actual principal sum of such usurious contract can be enforced in any court in this state, either at law or in equity."

The second portion of the statute provides: "* * * and when said usurious interest *is taken or reserved, or has been paid*, then and in that event the person who has *taken or reserved, or has been paid*, either directly or indirectly, such usurious interest, shall forfeit to the party from whom such usurious interest *has been reserved, taken or exacted* in any way, double the amount of *interest so reserved, taken or exacted*: * * *" (Emphasis supplied).

It is crystal clear from the first quoted portion of the statute that the actual principal sum of the usurious contract may be recovered by the lender and that he forfeits only the interest where he makes a contract to charge or reserve more than 15% from a corporate borrower. (This is the penalty held applicable by the Court of Appeals decision.)

It is also clear from the second quoted portion of the statute that only when usurious interest is taken or reserved in advance or been paid does the lender forfeit double the amount of bonus or interest so withheld or paid. (This is the penalty contended for by Petitioners.)

The Supreme Court of Florida has expounded on and explained the difference between the two penalty provisions of Section 687.04, Florida Statutes. In the leading case of *Wilson* v. *Conner*, 106 Fla. 6, 142 So. 606 (1932), cited by Petitioners, which will be more fully discussed hereinafter, Justice Davis at page 608 had this to say about these two penalty provisions:

"In this connection it must be observed the statutes make a distinction between the consequences which follow usurious interest 'taken', 'reserved' or 'paid' in contemplation of law, as distinguished from the mere entering into an agreement for the 'taking', 'reserving' or 'paying' of usury, but under which latter kind of agreement no usury is actually 'taken', 'reserved' or 'paid' at the time of the usurious contract, or thereafter in the course of its performance.

"Accordingly, under Section 6939 C.G.L., supra [predecessor to Section 687.04, Florida Statutes], the penalty for merely entering into an agreement for usurious interest is that such interest cannot be enforced in any court in any kind of action. On the other hand, the penalty for *actually taking, reserving, or exacting* usurious interest is forfeiture of double the 'amount of interest so reserved, taken or exacted'.

"The reason for this distinction as to penalty is not hard to ascertain. To exact a mere promise from the borrower to pay interest which the lender will have to enforce through judicial proceedings to which the defense of usury may be interposed, and thereby defeat the accomplishment of the wrong *before it is consummated by* realization of its illegal fruits, is undoubtedly less reprehensible and less burdensome to the borrower than when he is compelled to enter into an obligation by which the usurious interest is in effect *taken, reserved, or paid in advance* by means of the device, contrivance, or agreement under which the borrower is obligated to pay and the lender secured in the enforcement of the obligation. The latter kind of device requires affirmative steps to be taken by the borrower to secure relief from the usurious interest which in the first instance he can evade by merely interposing a defense, if, as, and when the lender pursues him.

"We hold, therefore, that any person wilfully violating the usury law by means of any contract, contrivance, or device whatever, whereby the debtor is required or obligated to pay a sum of money greater than the *actual principal sum received*, together with interest at the rate of 10 per cent per annum thereon, must forfeit the entire interest so charged, or contracted to be charged or reserved, and that in such cases only the *actual principal sum* of such usurious contract will be enforced in any court of this State, either at law or in equity, *but* we are also of the opinion that when said usurious interest is not only contracted for, but is *taken, reserved, or has been paid* by means of the device employed for that purpose, then and in that event, as is provided by Section 6939 C.G.L., supra, the violator forfeits to the party from whom such usurious interest *has been in fact taken, reserved, or exacted* double the amount of interest so reserved, taken or exacted. (Emphasis supplied)"

It will be specifically noted that the words "taken", "reserved", "paid" and "exacted" as used in the second penalty provision of Section 687.04, Florida Statutes, are all in the past tense. In other words, there must be an actually accomplished fact of taking, reserving, paying, or exacting of usurious interest before this particular double penalty is inflicted. The word "reserved" is defined as "retained; kept; kept back; not delivered; withheld." (See Webster's New International Dictionary, Second Edition, Unabridged).

It is, therefore, also crystal clear that the second penalty provision only applies and is inflicted on a lender *wilfully* violating Section 687.03, Florida Statutes, *where the borrower has actually paid usurious interest or where the lender has retained or kept back or not delivered to the borrower the full amount of the*

*principal of the loan so that in legal effect the lender has reserved or been paid in advance the usurious interest to the same effect as if the borrower had actually paid such usurious interest to the lender.*

The above interpretation of the second penalty provision of Section 687.04, Florida Statutes, is specifically borne out by all the decisions cited by Petitioners. They persist, however, in misunderstanding the interpretation of the words "taken or reserved" as used in said statute and are attempting to mislead this Court by claiming support for their position in the cases cited in their Petition, when a careful reading of said cases clearly demonstrates just the opposite, i.e., nonsupport of their position, while completely and succinctly supporting the decision of the Court of Appeals. Accordingly, the recognized law of Florida interpreting the Florida Usury Statute does not support the Petitioners' contention as set forth in their Petition (Petition, pp. 7-14).

In *Wilson* v. *Conner*, supra, the borrower signed a $10,000 mortgage note payable in two years with 8% interest per annum payable semi-annually in advance. The lender only turned over to the borrower the sum of $8,447.75 reserving $1,552.25 in advance, which sum of $1,552.25 consisted of (1) $800.00 interest in advance for one year at 8% on $10,000.00; (2) $500.00 bonus for making the loan; and (3) $252.25 for expenses of making the loan. The court held that the $252.25 was for legitimate expenses, but that the $800.00 advance interest and the $500.00 bonus was also interest and that, therefore, the borrower had only received $8,700.00 of the $10,000.00 principal signed for, making a fictitious amount of $1,300.00 which the lender had actually

"reserved, taken or exacted". The borrower had not paid any part of the principal or interest to the lender. The Court found that the $800.00 advance interest collected plus the $500.00 bonus or $1,300.00 was usurious. The Court thereupon decreed that the borrower could not collect any part of the 8% interest called for by the $10,000.00 note, and because the lender had taken or reserved $1,300.00 in advance, also deducted twice the amount of $1,300.00 or $2,600.00 from the principal of $8,700.00 actually loaned, giving the borrower a judgment for $6,100.00. The Court, however, did not double the interest called for in the note because it had not been taken, reserved, or paid. Thus, the Court only applied the second penalty provision to the $1,300.00 which had been taken or reserved in advance by the lender. The Court said on page 609:

> "In the case at bar we have held that $8,700 was the actual amount loaned. The interest exacted on this sum amounted to $1,300 for the first year, and is plainly usurious under Section 6939, C.G.L., supra. All of the agreed future interest provided for in the contract was at the outset also legally forfeited through the mere attempt to charge it, regardless of whether any of it was even 'taken or reserved' or 'paid' at that time or not.
>
> "Therefore, not only did the lender forfeit the right to receive under his contract *any interest on the actual amount loaned*, because of his usurious agreement, but he also incurred, in addition thereto, the forfeiture of double the amount of the usurious interest which in contemplation of law *had already been reserved, paid, or exacted* from the debtor at the time the note and mortgage were signed. This means that the lender has forfeited, in addition to all interest which he might legitimately have otherwise collected on the actual loan of $8,700, an

additional sum of $2,600 as a penalty for the *accomplished wrong done by the exaction made.* (Emphasis supplied)"

It is clear that the above case does not stand for the proposition asserted by the Petitioners in their Petition to the effect that the Court should also inflict the double penalty as to the interest in the original and supplemental notes, which was never paid by Petitioners and which was never "taken, reserved, retained, kept, kept back, not delivered, withheld, or exacted" by Aviation Credit, and in fact not even claimed or sued for by Aviation Credit, its suit being for interest at 11.58%, on the principal sums advanced from the dates of advancement, and not for the interest in the said original and supplemental notes. In fact, it is extremely clear that the case supports entirely the position of Aviation Credit that said agreed future interest, either based on the notes or as claimed and sued for, is merely forfeited and not doubled as claimed by Petitioners.

In the case of *Sherman* v. *Myers*, 108 Fla. 129, 146 So. 213 (1933), cited by Petitioners, the mortgagor-borrower signed a note for $40,000.00 payable in three (3) years with interest at 8% per annum. The borrower only received $32,000.00 out of the principal of $40,000.00 signed for. The borrower during the course of performing on the note also paid $4,200.00 in actual interest payments at the rate of 8% on the $40,000.00 as called for in the note. The chancellor in the lower court doubled the $4,200.00 interest actually paid or $8,400.00, which he deducted from the principal sum of $32,000.00 actually advanced by the borrower, but only eliminated the $8,000.00 "interest" reserved in advance or withheld, retained, or kept by the borrower.

The Florida Supreme Court in following the principle laid down by *Wilson* v. *Conner*, supra, held that the $8,000.00 reserved or taken in advance by the borrower should also be doubled under the second penalty provision of the Florida Usury Statute. Thus, we see again that the double penalty provision of the usury statute is only to be inflicted where the borrower has in fact actually "taken, reserved, retained, kept back, not delivered, withheld, exacted or been paid" the usurious interest. The Court did not, as claimed by Petitioners herein, inflict the double penalty on any interest which the borrower merely charged or contracted to charge or exact and which had not in fact actually been "taken, reserved, paid or exacted".

In the case of *Ross* v. *Atlas Finance Corporation*, 133 Fla. 793, 152 So. 110 (1934), cited by Petitioners, the mortgage note signed by the borrower was for $3,500.00 but the actual principal sum advanced by the lender was $3,150.00. The court held that double the amount of the bonus *charged and retained plus interest paid* should be deducted from $3,150.00 the actual principal advanced, rather than from the face of the note. Again, it is clear that this cited case does not stand for the proposition espoused by Petitioners.

In the case of *Carr* v. *Cole*, 119 Fla. 260, 161 So. 392 (1935), cited by Petitioners, the mortgage borrower signed a note for $10,000.00 payable in five years with 8% interest per annum from date. The borrower actually only received $8,000.00 of the principal sum of $10,000.00 signed for. The borrower had also paid interest of $3,100.00. The court held that for the use of $8,000.00 for five years, the lender exacted a return of $5,100.00 plus the principal sum originally advanced

of $8,000,000 and thus calls for 12½% interest per annum. The court doubled the $1,000,000 reserved in advance as well as the $3,100,000 interest actually paid, thus following the prior decision on this point. The Court said at page 393:

> "Section 6939, C.G.L. 1927, provides that any person willfully violating the provisions of Section 6938, supra, shall forfeit the entire interest so charged, or contracted to be charged, or reserved, and when the usurious interest *has been* taken, or reserved, or has been paid, then, and in that event, the guilty person, who has taken or reserved or has been paid, either directly or indirectly, such usurious interest, shall forfeit to the party from whom such usurious interest *has been* reserved, taken, or exacted in any way, double the amount of interest so reserved, taken, or exacted.
>
> * * *
>
> "It is clear therefore that both the amount of interest *actually* paid and the sum of $1,000 excess over the actual loan of $8,000 exacted by the contract or note should be doubled and forfeited to Mrs. Cole. (Emphasis supplied.)"

It is obvious that this case does not support Petitioners' contention.

In the case of *Arcus v. Green*, 57 So. 2d 30 (Fla. 1952), cited by Petitioners, the mortgagor-borrower signed a note for $2,700,000 principal with interest at 5% per annum payable $15,000 per month for thirty-five months, the balance payable three years from date. No payments on principal or interest were made. Suit was brought to foreclose four months after the date of the execution of the mortgage note. The borrower sought to recover $2,067.82 made up of seven items as follows:

1. $2,100.00 principal actually advanced on the principal sum of $2,700.00 signed for.
2. $320.00 subsequently advanced.
3. $20.00 subsequently advanced.
4. $52.50 legal fees for the mortgage loan.
5. $25.18 for insurance premium.
6. $15.00 for abstracting charges.
7. $93.14 for miscellaneous fees, including commission for placing loan.

The Court held that the $320.00 subsequently loaned or advanced were separate loans from the note in question and similarly treated the $133.32 for abstracting, insurance and miscellaneous fees, further holding that the actual principal amount received by the borrower on the $2,700.00 note was $2,152.50, made up of the $2,100.00 actual cash advanced and the sum of $52.50 for legal fees in connection with the mortgage loan. The Court then went on to hold that the amount of $547.50 ($2,700.00 minus $2,152.50) which was taken or reserved in advance or expected should be doubled under the double penalty provision of the usury statute. The Court said at page 34:

> "We hold, therefore, that the obligation here sought to be foreclosed was wholly usurious at its inception and that the lender must forfeit double the amount of interest so reserved, charged, or taken in accordance with the provisions of Section 687.04. Stated in this case, as interest payments were made by the appellants, the forfeiture will apply against the 'shares' reserved, to wit, $547.50 ($2700.00 minus $2152.50), which, when doubled the amount thereof is deducted from the amount actually loaned, will leave a balance due the lender, on the particular obligation here sought to be foreclosed, of $1,057.50. (Emphasis supplied)."

Again, it is clear that the above cited case does not support the proposition asserted by Petitioners to inflict the double penalty on interest which was never paid or reserved or taken in advance.

In addition to the fact that the cases cited by Petitioners do not support their position on the law of Florida, they steadfastly refuse to recognize that the factual situations in the above cited cases are entirely different from the case at bar. In the former, notes were taken in fictitious face amounts greater than the principal sum of the loan to the borrowers and for the purpose of concealing unlawful interest. The holders then sought to enforce payment of the full face amount of the notes plus interest thereon as set forth on the notes.

Here, Aviation Credit by contract agreed to advance specific sums of money to and for the benefit of Conner and did so to the extent of $182,630.65 in exact accordance with the written agreements executed by the parties. It did not take out, retain or "reserve" anything from the principal amounts advanced. It sought enforcement, not of the face amount of its notes, but only of the principal advances made, for the contract itself provided that adjustments were to be made if the amounts anticipated to be advanced were not advanced. No payments whatsoever of principal or interest were made by Conner or anyone in its behalf, upon any of its obligations, either in advance or subsequently in any way or manner. (Finding No. 11, R. 116).

The Court of Appeals in its opinion cited applicable Florida decisions construing the penalty section of

the usury statute and demonstrated its understanding and correct interpretation thereof by stating:

> "If it is correct to say that the $33,310.18 was taken or reserved, or has been paid by Conner, then the imposition by the court of double the amount of the usurious bonus from the true principal was proper. If there was not any payment, or any taking or reserving of usurious interest, then only full amount of the principal, without interest, may be recovered. (Petition, App. 10)
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> * * *
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> "The provision for the forfeiture of double the amount of the interest exists only if the usurious interest has been paid or has been taken or reserved. Certainly Conner did not pay the so-called bonus to Aviation Credit. Was it otherwise paid, taken or reserved? It was not, unless it can be said that a paying, taking or reserving resulted from the transfer of the amount of the bonus from Aviation Credit to Smith Aircraft. The undertaking of Conner to pay Aviation Credit the $33,310.18 constituted usury, but only because of the relationship between the two Smith corporations. By reason of that same relationship we are precluded from saying that the transfer by one of them to the other is the paying, taking or reserving of the usurious bonus. Because of the relationship, it follows that the situation is no different than if Conner had agreed to pay, but did not pay, the sum to Aviation Credit as additional interest or as a financing bonus. The interjection of the related company, Smith Aircraft, into the arrangement does not change the nature of what was done insofar as concerns the payment by Conner, or the taking or reserving by Smith Aircraft, of the bonus. Hence we reach the conclusion that it was error to determine, as the district court determined, that the bonus of $33,310.18

was paid or taken or "reserved." (Petitioners' App. II)

## CONCLUSION

Neither the facts nor the law support the contentions of Petitioners that the double penalty provisions of Section 687.04, Florida Statutes, 1965, should have been imposed upon Respondent Aviation Credit since no interest or bonus was paid by or taken, reserved or exacted from the Petitioners.

In any event, the decision of the United States Court of Appeals for the Fifth Circuit was not in conflict with the applicable law of Florida and we respectfully submit that the Petition for Writ of Certiorari should be denied.

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*Attorneys for Respondents*

### Certificate of Service

I, Robert V. Smith, one of the attorneys for the Respondents, Aviation Credit Corporation, L. B. Smith Vacuum Corporation, and L. B. Smith, in the above-styled cause, do hereby certify that copies of the Respondents' Brief in Opposition to Petition for Writ of Certiorari have this day been mailed to Henry M. Stoltair, 1601 Alfred I. duPont Building, Miami 32, Florida, Attorney for Petitioners, Conner Avenue Liquors, Inc., and E. A. Conner.

Dated this 11th day of October, 1966.

ROBERT V. SMITH